

BRB No. 11-0333

PAUL ATTWOOD)
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 Claimant-Petitioner)
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 v.)
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 ARMOR GROUP, INCORPORATED) DATE ISSUED: 04/26/2011
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 and)
)
 AIG WORLDSOURCE)
)
 Employer/Carrier-)
 Respondents) ORDER

Employer has filed a Motion to Dismiss claimant’s appeal in this case. Claimant has appealed the district director’s refusal to issue a default order pursuant to 33 U.S.C. §918(a). Employer contends this appeal is not properly before the Board, as the case was referred to the Office of Administrative Law Judges (OALJ) for resolution of factual disputes related to claimant’s request for a Section 14(f), 33 U.S.C. §914(f), assessment. Claimant responds, contending that employer’s motion was untimely filed and that the Board has jurisdiction over an appeal of the district director’s denial of a default order.¹ In reply, employer asserts that the regulations permit a motion to dismiss to be filed at any time.² We reject claimant’s assertion that employer’s motion to dismiss was not filed in a timely manner as 20 C.F.R. §802.401(b) states that “at any time” prior to the issuance of a decision, “any party may move that the appeal be dismissed.”

¹We deny employer’s motion to strike claimant’s petition for review and brief. 20 C.F.R. §802.215.

²Employer moves the Board to accept its “reply brief,” despite there being no specific provision allowing for a reply to a response to a motion. 20 C.F.R. §802.219. We accept the brief in reply. 20 C.F.R. §802.215.

In this case, the administrative law judge approved the parties' Section 8(i), 33 U.S.C. §908(i), settlement agreement in a Decision and Order dated October 7, 2010. The district director filed the Decision and Order on October 14, 2010, and employer states that on October 18, 2010, it electronically transferred the settlement proceeds to the Canadian bank account identified by claimant in the settlement agreement.³ Employer also states that the bank rejected the transfer because the account did not exist and that it was unable to effectuate payment until the problems with the foreign bank account were resolved. On January 5, 2011, the district director held an informal conference to address claimant's claim for a Section 14(f) assessment as a result of the late payment of benefits. The district director recommended payment of the additional 20 percent of compensation under Section 14(f), and stated that if there is a disagreement about this recommendation, the case should be referred to the OALJ for a formal hearing. Employer filed an LS-18 pre-hearing statement, and the case was referred to the OALJ. On January 19, 2011, claimant filed a Motion for Default Order with the district director. On January 21, 2011, the district director wrote a letter to the parties stating he would not issue a default order because the OALJ has jurisdiction over the case. Claimant then filed his timely appeal to the Board, and employer moves to dismiss the appeal because the case is pending before the OALJ.

Section 14(f) provides a claimant with an additional 20 percent assessment of compensation, payable by the employer, if the employer does not pay the claimant's compensation within 10 calendar days after payment becomes "due." 33 U.S.C. §914(f); *Burgo v. General Dynamics Corp.*, 122 F.3d 140, 31 BRBS 97 (CRT), *reh'g denied*, 128 F.3d 801 (2^d Cir. 1997), *cert. denied*, 523 U.S. 1136 (1998); *Sea-Land Service, Inc. v. Barry*, 41 F.3d 903, 29 BRBS 1(CRT) (3^d Cir. 1994); *Lauzon v. Strachan Shipping Co.*, 782 F.2d 1217, 18 BRBS 60(CRT) (5th Cir. 1985). The Board has held that the claimant may waive his entitlement to a Section 14(f) assessment as a clause in a Section 8(i), 33 U.S.C. §908(i), settlement. *D.G. [Graham] v. Cascade General, Inc.*, 42 BRBS 77 (2008).

This case is analogous to *Graham*. In *Graham*, a claimant and his employer agreed to settle pursuant to Section 8(i) their dispute over the claimant's entitlement to benefits following his work injury. In the settlement agreement, the claimant provided his correct street address; however, because he failed to provide a mailbox at that address into which the settlement check could be delivered by the United States Postal Service, the employer contended the claimant violated the settlement clause and waived his right to a Section 14(f) assessment. The employer paid the assessment ordered by the district director and appealed to the Board. The Board held that a claimant may waive his right

³ Claimant is a resident of Canada.

to a Section 14(f) assessment in a Section 8(i) settlement as it is “compensation,” and remanded the case to the OALJ for findings of fact regarding the interpretation of the settlement clause and whether a waiver occurred. *Graham*, 42 BRBS 77; *see also* 20 C.F.R. §702.372(a).⁴ The administrative law judge has jurisdiction to address factual matters which must be resolved before the district director is able to issue a default order. *Hanson v. Marine Terminals Corp.*, 34 BRBS 136 (2000). Thus, it is appropriate for the district director to refer the case to the OALJ when there are factual issues that must be resolved before he can determine whether a claimant is entitled to a Section 14(f) assessment. The administrative law judge has jurisdiction to address those factual matters, which may include issues such as the interpretation of a settlement clause pertaining to a claimant’s Section 14(f) assessment.⁵ *Graham*, 42 BRBS 77; *Hanson*, 34 BRBS 136.

Employer avers that this case involves the interpretation of a settlement clause wherein claimant agreed that delivery of the settlement proceeds to a bank account would satisfy Section 14(f), yet employer asserts it was unable to timely deliver the proceeds because the bank account was non-existent. Employer correctly contends that this case

⁴Upon receipt of an application for an order declaring the amount of the default, the district director

shall institute proceedings . . . as if such application were an original claim for compensation, and the matter shall be disposed of as provided for in §702.315, or if agreement on the issue is not reached, then as in §702.316 *et seq.*

20 C.F.R. §702.372(a). Section 702.315 addresses informal resolution of the claim, and Section 702.316 contemplates that the matter may be referred to an administrative law judge for resolution where the parties are not in agreement following informal proceedings. 20 C.F.R. §§702.315, 702.316; *see, e.g., Stetzer v. Logistec of Connecticut, Inc.*, 547 F.3d 459, 42 BRBS 55(CRT) (2^d Cir. 2008); *Bray v. Director, OWCP*, 664 F.2d 1045, 14 BRBS 341 (5th Cir. 1981); *Kelley v. Bureau of National Affairs*, 20 BRBS 169 (1988).

⁵If the district director refuses to issue a default order *and* no factual issues are in dispute, the Board has jurisdiction over a direct appeal of the district director’s order denying a default order. *See Durham v. Embassy Dairy*, 19 BRBS 105 (1986). Similarly, if the district director issues a default order and employer pays the amount owed, the Board has jurisdiction over a direct appeal of the order declaring default because proceedings under Section 18(a), 33 U.S.C. §918(a), are unavailable. *See Sea-Land Service, Inc. v. Barry*, 41 F.3d 903, 29 BRBS 1(CRT) (3^d Cir. 1994).

raises factual issues that must be addressed by the administrative law judge before the district director can fully address claimant's entitlement to a default order and a Section 14(f) assessment. *See Stetzer v. Logistec of Connecticut, Inc.*, 547 F.3d 459, 42 BRBS 55(CRT) (2^d Cir. 2008); *see also Hanson v. Marine Terminals Corp.*, 307 F.3d 1139, 36 BRBS 63(CRT) (9th Cir. 2002); *Graham*, 42 BRBS 77. Therefore, as this case is properly pending before the OALJ, we grant employer's motion to dismiss claimant's appeal.

Accordingly, we grant employer's motion to dismiss claimant's appeal.⁶

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

⁶In light of our decision to grant employer's motion to dismiss claimant's appeal, employer's motion to stay the briefing schedule is moot.